IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA **PLAINTIFFS**

v. **CASE NO.: 05-CV-0329-TCK-SAJ**

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC. CARGILL, INC., CARGILL TURKEY PRODUCTION, LCC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC. SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC. **DEFENDANTS**

REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER

Defendants Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; Cobb-Vantress, Inc.; Cal-Maine Foods, Inc.; Cal-Maine Farms, Inc.; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; Simmons Foods, Inc.; Cargill, Inc.; Cargill Turkey Production, LLC and Willow Brook Foods, Inc. (the "Poultry Defendants") submit their Reply to Plaintiff's Response in Opposition to Motion for Protective Order.

I. INTRODUCTION

The Motion before the Court and Plaintiff's response to that motion raise serious questions as to the manner in which discovery is going to be conducted in this case. Plaintiff

seeks a judicially-declared easement onto and across private property to be exercised at its discretion at unspecified times for the purpose of conducting secret tests the results of which it will release to the Poultry Defendants at some unspecified time in the future *if* its experts decide to rely upon those tests (i.e., if the tests results are favorable to their case). In their Motion for Protective Order, the Poultry Defendants seek *only* the recognition by Plaintiff and by this Court of their firmly-established rights to reasonable notice as to the time, place and manner of the activities which Plaintiff seeks to conduct pursuant to subpoenas issued from this Court and the imposition of appropriate conditions to protect them from the very real potential for damage as a result of the Plaintiff's proposed actions.[1] Plaintiff's response seeks to belittle or dismiss the Poultry Defendants' concerns but offers no legal or factual basis for denying the relief sought in the Motion.

II. ARGUMENT AND LEGAL AUTHORITY

A. Timely Notice of the Rule 45 Subpoenas Must Be Given.

Plaintiff takes a "no harm – no foul" approach to the first point raised by the Poultry Defendants in their Motion by blithely stating "Defendants had ample time in which to file their objections, and they did so." (Pls. Resp. to Tyson Chicken, Inc.'s Motion to Quash, p. 3, Dkt. No. 565.) The point is not whether the Poultry Defendants managed in this one instance to figure out on their own that Plaintiff had issued and was serving subpoenas, obtain copies of those subpoenas and file timely objections to the same. Obviously, that is what occurred here. The issue before the Court is whether Plaintiff is going to be ordered to provide *prior notice* of Rule 45 subpoenas during the balance of this case or not.

[1] The relief sought in the Motion for Protective Order is necessary only in the event the Court denies the Motions to Quash filed by the owners of the properties to be sampled. Dkt. Nos. 485, 512, 539. By seeking relief contingent upon a denial of those motions, the Poultry Defendants are in no way inviting this Court to deny those well-founded Motions to Quash.

This Court has already interpreted Rule 45's prior notice provision to require that parties provide notice of the issuance of subpoenas to parties *before* the service of those subpoenas. *See JB and JEB v. ASARCO, Inc.*, Case No. 03-CV-498 H(C). Plaintiff should have simply acknowledged the requirements of the law and pledged to adhere to those requirements in the future. Since it did not, the Court should enter an order requiring Plaintiff, in the future, to comply with the notice requirements set forth in Rule 45(b)(1).

B. Plaintiff's Subpoenas Do Not Meet the Specificity Requirements of Rule 45 and Rule 34.

In its Response, Plaintiff does not take serious issue with the Poultry Defendants' description of the specificity required in a Rule 45 subpoena with respect to the time, place and manner of inspection, sampling or related acts. Rather, Plaintiff argues that the circumstances of this case simply prevent it from being more specific and that even in the absence of the required specificity the inspection and testing should proceed because the subpoenas are not, in its opinion, unduly burdensome to the Poultry Defendants.

Plaintiff's response to the Poultry Defendant's argument that the subpoenas are deficient because they do not identify the location of the "waste applied fields" from which Plaintiff intends to collect hundreds of soil samples and on which Plaintiff intends to install ground monitoring wells and edge-of-field run off plots offers an illustration of the cavalier manner in which Plaintiff is approaching its sampling campaign. Plaintiff has claimed in this case to have information available to it sufficient to permit it to identify these "waste applied fields." (*See* Pls. Resp., p. 10) ("The State is in possession of records reflecting the land application of waste reported by growers and private and commercial waste applicators.") Yet, it has refused to identify the location of these "waste applied fields" in its subpoenas. In its Response, Plaintiff arrogantly states that it will tell the parties where those fields are "at the time of the inspection."

(Pls. Resp., p. 3.) Rule 45 requires that the *subpoena* specify the place of inspection and sampling. Parties to an action and property owners targeted by Rule 45 subpoenas are entitled to specific notice as to the place on which inspection and sampling will occur. FED. R. CIV. P. 45(a)(1)(C); FED. R. CIV. P. 34(b).[2]

Plaintiff has not offered any meaningful response to the Poultry Defendants' argument that the subpoenas seek to improperly reserve to Plaintiff a *continuing* right of access at *unspecified times* without adequate notice to the parties to this action or the property owner. Plaintiff does not deny that it is seeking a continuing right of access, nor has it explained to this Court, to the Poultry Defendants or to the property owners how it intends to provide advance and specific notice, as required by Rules 45 and 34, of the future sampling events contemplated by its subpoenas. The Federal Rules of Civil Procedure are clear in their requirement that specific notice of the date and time of the inspection or sampling be provided. FED. R. CIV. P. 45(a)(1)(C); FED. R. CIV. P. 34(b). Plaintiff's response provides no legal authority whatsoever that would permit a continuing right of access at unspecified times under a Rule 45 subpoena. The only case cited by Plaintiff is unpersuasive on the issue before the Court. The case of *United States v. IBM Corp.*, 83 F.R.D. 97, 107 (S.D.N.Y. 1979) discusses the specificity requirements of Rule 45 in the context of a *document request*, not a request to inspect and conduct sampling of real property.

Likewise, Plaintiff's response offers no legal justification sufficient to excuse it from the obligation under the Federal Rules to specify the "manner of making the inspection and

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[2] Courts have recognized that Rule 34 and the case law regarding Rule 34 inspections are persuasive in determining the proper scope of and procedures for inspections and sampling sought of non-parties pursuant to Rule 45 subpoenas. See *Goodyear Tire v. Kirk's Tire, Inc.*, 211 F.R.D. 658, 662 (D. Kan. 2003) (citing Advisory Committee Note to the 1970 Amendment of Rule 45(d)(1) and 9A Wright & Miller, *Federal Practice and Procedure*, § 2459 (2d ed. 1995)); *see also In re Cusumano*, 162 F.3d 708, 714 (1st Cir. 1998) (relying on 9A Wright & Miller, *Federal Practice and Procedure*, § 2452 (2d ed. 1992)).

performing the related acts." FED. R. CIV. P. 34(b). The "related acts" for purposes of the subpoenas at issue are the various laboratory tests, assays and chemical analyses that Plaintiff intends to perform on the samples collected and, of course, the results of those tests. Poultry Defendants have requested that Plaintiff identify the tests that it intends to perform on samples collected under these subpoenas and that all the parties to this action be supplied with the results of Plaintiff's testing. Plaintiff has flatly refused to provide such information. This refusal is particularly surprising given the comments made by Attorney General Edmondson at the March 23, 2006 hearing that resulted in the issuance of these subpoenas. At that hearing, Mr. Edmondson sought to impugn the Poultry Defendants for resisting the Plaintiff's desire to issue these subpoenas by remarking:

> The one item of curiosity that I have left with me, Your Honor, is why these defendants are not joining with us in this motion, why these companies are not as eager as we are to find out for certain what the samples tell us, to find out for certain what the degree of risk is, to find out for certain what the danger is to public health, to find out for certain whether or not carcinogens are in our water supplies . . . . .

(Tr. 3/26/06 Hrg., p. 13.) Either General Edmondson was simply engaged in insincere grandstanding or something has changed since the March 23rd hearing, because when the Poultry Defendants actually expressed an interest in "finding out for certain what the samples tell us" they were told that the nature of tests to be performed and the results of those tests were considered to be "attorney work product" and would not be disclosed. (Pls. Resp., p. 7.) There are, of course, at least two problems with that response. First, the Federal Rules of Civil Procedure require Plaintiff to specify the related acts it intends to perform on samples collected through court-sanctioned discovery. Fed.R.Civ.P. 34(b). This is formal discovery, and formal discovery is conducted openly and honestly, not in secret. Second, the results of environmental

sampling are not attorney work-product. *See, e.g., Horan v. Sun Company, Inc.*, 152 F.R.D. 437, 439 (D.Rhode Island 1993) ("Environmental test results contain relevant, non-privileged facts.")

C. The State's Proposed Biosecurity Guidelines Are Inadequate.

In its response, Plaintiff advances two arguments in opposition to the Poultry Defendant's request that inspections or sampling on poultry farms be conducted in accordance with their biosecurity protocols and policies. First, Plaintiff claims that its proposed biosecurity protocols are equivalent to or just as good as the policies and protocols that the Poultry Defendants use in the conduct of their business. Second, Plaintiff claims that the Poultry Defendants, particularly Tyson, is using "recently revised" biosecurity policies as an attempt to "[obfuscate] the State's sampling efforts." (Pls. Resp., p. 9.) Neither of these claims have any merit whatsoever.

As between the Poultry Defendants and the Plaintiff there can be no serious debate as to which of the parties is in the superior position to determine whether on-farm activities present biosecurity risks and to evaluate the safeguards necessary to minimize the risks of the transmission of bird diseases. Many of the Poultry Defendants have longstanding written biosecurity policies establishing necessary conditions upon the access to poultry farms. Plaintiff seeks to brush all of these policies aside with empty promises that it intends to conduct its sampling in a safe and reasonable manner and with their "propos[al] that sampling or testing conducted inside poultry houses be conducted when there is no flock present in the house." (Pls. Resp., p. 6-7.) While the Poultry Defendants appreciate the sentiment behind Plaintiff's proposal, that gesture does not dissolve the very real risks presented by Plaintiff's proposed sampling.[3] Bird diseases can be transmitted even in the absence of birds. For example,

[3] In its Response, Plaintiff states "Defendants neither acknowledge nor address this proposal in their Motion for Protective Order." (Pls. Resp., p. 6.) Apparently, Plaintiff did not carefully read the Motion for Protective Order. This proposal was acknowledged and its inadequacies explained in footnote 9 of the motion.

Infectious Laryngotracheitis ("LT") can be transferred through contact with manure, feathers and bedding material. (*See* Affidavit of Dr. Patrick Pilkington, p. 2.)

This Court need not guess as to what biosecurity protocols are appropriate for access to farms. The Poultry Defendants already have detailed policies in place developed by trained personnel who are intimately familiar with the bird disease risks attendant to each integrator's business and the procedures necessary to properly manage those risks. Unfortunately, Plaintiff's one page proposed biosecurity protocol and its "one-size-fits-all" approach fall well short of the protocols deemed necessary by some of the Poultry Defendants. For example, all Tyson farms in the area to be sampled are currently under a heightened biosecurity status due to the concerns of the public and government officials relating to bird diseases such as Avian Influenza (AI), Infectious Laryngotracheitis (LT), and Exotic Newcastle Disease (END). (*See* Ex. 1, Affidavit of Dr. Patrick Pilkington, p. 2.) In these circumstances, Tyson's biosecurity policies prohibit the entry of farms under contract with Tyson by persons who have been on any other poultry farm within the previous seventy-two hours. (*See* Ex. 1, Affidavit of Dr. Patrick Pilkington, p. 2.) Plaintiff's proposed biosecurity protocols do not incorporate the seventy-two hour waiting period.[4] Separate Defendant, Cobb-Vantress, raises highly valuable grandparent breeding stock, and its biosecurity protocols are even more stringent than Tyson's. Cobb-Vantress' policies include a seven day waiting period for persons who have previously been on other poultry farms.

[4] In fact, whether Plaintiff intends to incorporate any waiting period whatsoever is unclear. In correspondence from its counsel dated May 2, 2006, Plaintiff proposed a forty-eight hour waiting period between sampling at farms under contract with different integrators. (*See* Ex. 2 to Defendants' Motion for Protective Order, May 2, 2006 Correspondence from Mr. Bullock to Mr. McDaniel.) However, the biosecurity protocols attached by Plaintiff to its Response contain no discussion of any waiting period. (*See* "Poultry Premise Entry Biosecurity Protocols for Regulatory Personnel" attached as Exhibit A to Affidavit of Becky Brewer-Walker, D.V.M.) It is worth noting that Plaintiff initially stated that its experts would "follow any biosecurity guidelines established by the facility [they] are visiting." *Id.* However, now that those guidelines have been provided by Tyson, Plaintiff seeks to rescind its prior offer.

(*See* Ex. 2, Affidavit of John Chevallier. p. 2.) It is unclear whether Plaintiff intends to adhere to this requirement or not.

Plaintiff's attempt to portray Tyson's recent revision of its biosecurity protocols as an effort to "[obfuscate] the State's sampling efforts" is an entirely inaccurate representation. (Pls. Resp., p. 9.) Tyson explained the revision of its biosecurity protocols in footnote 10 to its Motion for Protective Order, filed in this action on May 4, 2005. Tyson stated as follows:

> Poultry Defendants' biosecurity protocols are not static. In the normal course of business, biosecurity protocols are revised from time to time to address immediate circumstances. The Poultry Defendants cannot control these circumstances nor accurately predict when it may be necessary to impose more stringent biosecurity protocols. . . .

Plaintiff's suggestion that Tyson concocted a scheme to thwart possible sampling through a tightening of its biosecurity policies reflects a disturbing degree of either arrogance or paranoia on the part of Plaintiff. Tyson has a business to run. In the course of running that business, Tyson, like all companies, responds to changes in circumstances by adjusting its policies from time to time. Tyson's February 2006 revision of its biosecurity policies was not motivated by the unfortunate fact that it has found itself the subject of Plaintiff's frivolous lawsuit. Those revisions simply reflect Tyson's decision that its biosecurity protocols needed to be updated in light of changed conditions and in an effort to best protect the health of its birds. (*See* Ex. 1, Affidavit of Dr. Patrick Pilkington, p. 2.)

D. The Court Should Require Plaintiff to Post a Bond.

Plaintiff has made clear in its Response that it absolutely does not want to post a bond. However, what is equally as clear is that the law permits this Court to require a bond and that Plaintiff has offered no legal or factual reason to excuse such a requirement in this case.

Plaintiff attempts to confuse this issue by asserting that Tyson's reliance on the district court's opinion in *Williams v. Continental Oil Co.*, 14 F.R.D. 58 (W.D. Okla. 1953) is "doubly misplaced" because the district court was reversed, and the case remanded by the Tenth Circuit in *Williams v. Continental Oil Co.*, 215 F.2d 4 (10th Cir. 1954). The proposition of law quoted by the Poultry Defendants from the district court's opinion in that case was as follows:

> The cases uniformly agree that where a survey is ordered the complete risk and hazard, if any must be borne by the plaintiff; the defendant cannot be submitted to possible loss. Without exception the plaintiff must post a bond sufficient to hold the defendant harmless.

Williams, 14 F.R.D. at 66. As it turns out, the district court also determined that the inspection and subsurface survey should not be allowed in that case, even though the plaintiff had offered to post a bond. *Id.* at 67. It was this decision – the decision not to permit the inspection – that was reversed by the Tenth Circuit Court of Appeals. The Tenth Circuit did not even address the issue of whether a court may require a party to post a bond prior to beginning inspection and sampling of real property.

Further support for the authority of this Court to require a bond is found in *Gliptis v. Fifteen Oil Co.*, 204 La. 896, 929 (La. 1943), in which the court required the plaintiff to post a bond in an amount "sufficient to protect defendant against such loss or damage as the court may think is reasonably to be expected to result from the survey." The *Gliptis* court reasoned that "[i]f the survey is made, it will be made not at the risk of defendant, but at the risk of plaintiff, who must pay all costs thereof and provide ample safeguard to protect defendant's rights." *Id.* at 927. *Gliptis v. Fifteen Oil Co.* has not been considered or reversed by any superior court.

Finally, Plaintiff's attempt to distinguish the case of *Micro Chemical, Inc. v. Lextron, Inc.*, 193 F.R.D. 667 (D. Colo. 2000) is ineffective. The testing in that case involved the alteration of property – a machine - and the court denied that request for such testing, in part,

because the party seeking the testing "neither made nor offered any provision for security in the event of damage to the machine or other loss . . ." *Micro Chemical, Inc.*, 193 F.R.D. at 669. Plaintiff's proposed testing in this case also involves the alteration of property. Plaintiff intends to bore hundreds of holes in the surface of these "waste applied fields" (i.e., pastures), to install groundwater monitoring wells complete with a concrete pad for stability of the pipe, and to drive a pipe deep into the subsurface of these properties to extract groundwater. This is alteration and the *Micro Chemical* case provides further support for the posting of a bond.

III. CONCLUSION

For the foregoing reasons, the Poultry Defendants request that this Court enter an appropriate protective order pursuant to Federal Rule of Civil Procedure 26(c) with respect to Plaintiff's proposed inspection and sampling under its Rule 45 subpoenas.

Respectfully submitted,

KUTAK ROCK LLP

By: /s/

Robert W. George, OBA #18562
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
(479) 973-4200 Telephone
(479) 973-0007 Facsimile

-and-

Stephen L. Jantzen, OBA #16247
Patrick M. Ryan, OBA # 7864
RYAN, WHALEY & COLDIRON, P.C.
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102
(405) 239-6040 Telephone
(405) 239-6766 Facsimile

-and-

Thomas C. Green, appearing *pro hac vice*
Mark D. Hopson, appearing *pro hac vice*
Timothy K. Webster, appearing *pro hac vice*
Jay T. Jorgensen, appearing *pro hac vice*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
(202) 736-8000 Telephone
(202) 736-8711 Facsimile

Attorneys for Defendants,
Tyson Foods, Inc., Tyson Poultry, Inc.
Tyson Chicken, Inc., Cobb-Vantress, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

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C. Miles Tolbert Secretary of the Environment State of Oklahoma 3800 N. Classen Oklahoma City, OK 73118 **PLAINTIFF**	William H. Narwold MOTLEY RICE LLC 20 Church Street 17th Floor Hartford, CT 06103 **ATTORNEYS FOR PLAINTIFF**
Monte W. Strout 209 W. Keetoowah Tahlequah, OK 74464 **ATTORNEY FOR CLAIRE WELLS, LOUISE SQUYRES, THIRD-PARTY DEFENDANTS**	Robin Wofford Rt. 2, Box 370 Watts, OK 74964 **PRO SE, THIRD PARTY DEFENDANT**
James R. Lamb D. Jean Lamb STRAYHORN LANDING Rt. 1, Box 253 Gore, OK 74435 **PRO SE, THIRD PARTY DEFENDANTS**	Gordon and Susann Clinton 23605 S. Goodnight Lane Welling, OK 74471 **THIRD PARTY DEFENDANT**
Kenneth and Jane Spencer James C. Geiger Individually and dba Spencer Ridge Resort Route 1, Box 222 Kansas, OK 74347 **PRO SE, THIRD PARTY DEFENDANTS**	Ancil Maggard c/o Leila Kelly 2615 Stagecoach Dr. Fayetteville, AR 72703 **THIRD PARTY DEFENDANT**
C. Craig Heffington 20144 W. Sixshooter Rd. Cookson, OK 74427 **PRO SE, SIX SHOOTER RESORT AND MARINA, INC., THIRD-PARTY DEFENDANT**	Richard E. Parker Donna S. Parker BURNT CABIN MARINA & RESORT, LLC 34996 S. 502 Road Park Hill, OK 74451 **PRO SE, THIRD PARTY DEFENDANT**
James D. Morrison Rural Route #1, Box 278 Colcord, OK 74338 **PRO SE, THIRD PARTY DEFENDANT**	Jim R. Bagby Route 2, Box 1711 Westville, OK 74965 **PRO SE, THIRD PARTY DEFENDANT**

Marjorie A. Garman 5116 Hwy. 10 Tahlequah, OK 74464 **THIRD PARTY DEFENDANT**	Doris Mares Dba Cookson Country Store and Cabins P.O. Box 46 Cookson, OK 74424 **PRO SE, THIRD PARTY DEFENDANT**
Eugene Dill P.O. Box 46 Cookson, OK 74424 **PRO SE, THIRD PARTY DEFENDANT**	Linda C. Martin N. Lance Bryan Doerner, Saunders 320 S. Boston Ave., Ste. 500 Tulsa, OK 74103 **THIRD PARTY DEFENDANT**
	Charles L. Moulton Arkansas Natural Resources Commission 323 Center St., Ste. 200 Little Rock, AR 72206

/s/ Robert W. George
Robert W. George

Robert W. George